Supreme Court, U.S.
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Nos. 99-224 and 99-582

In the Supreme Court of the United States

CHARLES B. MILLER, ET AL., PETITIONERS

v.

RICHARD A. FRENCH., ET AL.

UNITED STATES OF AMERICA, PETITIONERS

v.

RICHARD A. FRENCH., ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI IN NO. 99-244 FILED: AUGUST 3, 1999
PETITION FOR WRIT OF CERTIORARI IN NO. 99-582 FILED: OCTOBER 4, 1999
CERTIORARI GRANTED: DECEMBER 6, 1999

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-3075

RICHARD A. FRENCH, MORRIS E. DOZIER, MARTIN W. BRADBERRY, HENRY C. JENNINGS,
PLAINTIFFS-APPELLEES

v.

JACK R. DUCKWORTH, SUPERINTENDENT; BRUCE LEMMON, DEPUTY COMMISSIONER FOR OPERATIONS; EDWARD L. COHN, COMMISSIONER, INDIANA DEPARTMENT OF CORRECTION,
DEFENDANTS-APPELLANTS

AND

UNITED STATES OF AMERICA, INTERVENOR-APPELLANT

[Filed: Aug. 15, 1997]

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
9/2/97	Filed motion by Amicus Curiae USA to intervene. * * *
	* * * * *

DATE	PROCEEDINGS
9/10/97	ORDER issued GRANTING USA's motion to participate as intervening-appellant. * * *
	* * * * *
5/6/99	Filed opinion of the court by Judge Diane P. Wood. AFFIRMED. Circuit Judge Joel M. Flaum, Circuit Judge Ilana D. Rovner, Circuit Judge Diane P. Wood. Circuit Judge Easterbrook, with whom Chief Judge Posner, and Circuit Judge Manion, join dissenting from the denial of rehearing en banc. Note: This opinion was circulated pursuant to Circuit Rule 40(e) and this opinion is being released in typescript. A printed copy will follow. * * *
5/6/99	ORDER: Final judgment filed per opinion. With costs: n. * * *
	* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
(INDIANAPOLIS)

Civil Action No. IP 75-677-C

RICHARD A. FRENCH, MORRIS E. DOZIER, MARTIN W. BRADBERRY, HENRY C. JENNINGS, PLAINTIFFS

v.

THEODORE L. SENDAK, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF INDIANA; ROBERT E. HEYNE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE INDIANA DEPARTMENT OF CORRECTIONS; GEORGE W. PHEND, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE INDIANA STATE REFORMATORY; ALBERT CALHOUN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE CONDUCT ADJUSTMENT BOARD AT THE INDIANA STATE REFORMATORY; SGT. ROBERT CORNELISN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS INVESTIGATION OFFICER OF THE INDIANA STATE REFORMATORY, DEFENDANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
6/5/97	MOTION to terminate decree c/s DEFTS

DATE	PROCEEDINGS
	* * * * *
7/3/97	Temporary restraining Order that at 2:00 pm on this 3rd day of July 1997issues a TRO enjoining and prohibiting the automatic termination provision of the Prison Litigation Reform Act from taking effect and will expire at 2:00pm on the 7/13/97 and the hearing on the motion preliminary injunction is set for the 7/10/97 at 10:30a.m. * * *
7/3/97	NOTICE of claim of unconstitutionality c/s/ PLTFS * * *
	* * * * *
***6/30/97	PLAINTIFFS:
	(1) Motion for a TRO or Preliminary Injunction to Stay the Automatic Termination provision of the PLRA. c/s.
	* * * * *
	(3) RESPONSE to defts' Motion to Terminate Decree. c/s.
7/08/97	NOTICE TO THE Attny General of the USA-The constitutionality has been drawn into question * * *
7/11/97	ORDER GRANTING pltfs motion for preliminary injunction. TRO is now converted

DATE	PROCEEDINGS
	to a preliminary injunction. There shall be no stay of prospective relief in this matter and the parties shall continue to comply with this Court's prior orders and judgments until further order to the Court cm SHD * * *
	* * * * *
8/8/97	NOTICE OF APPEAL to the United States Court of Appeals for the Seventh Circuit from the order granting plaintiffs' motion for preliminary injunction entered July 11, 1997 * * *
	* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 75-677-C

RICHARD A. FRENCH, ET AL., PLAINTIFFS

vs.

NORMAN G. OWENS, DEFENDANTS

UNITED STATES OF AMERICA, AMICUS CURIAE

ORDER

Plaintiffs have moved the Court for a preliminary injunction enjoining the defendants, their agents, servants, employees, and all persons in active concert and participation with them from employing the use of chains, shackles, handcuffs, or any other form of hard or soft restraints on celled inmates.

The Court has heard evidence on the use of mechanical restraints on celled inmates at the Indiana Reformatory and, having fully heard the evidence presented by all parties to this proceeding, the argument of counsel, and being duly advised in the premises, now finds that a preliminary injunction should issue.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the following preliminary injunction be and hereby is issued enjoining defendants, their agents, servants, employees, and all persons in active concert and participation with them as follows:

1. For purposes of this preliminary injunction, the term "mechanical restraints" shall mean the use of hard or soft mechanical restraining devices to restrain a prisoner to his bed or in any other fashion in his cell, other than the routine use of restraints for transporting prisoners or the use of handcuffs alone to control unruly prisoners.

2. Mechanical restraints shall not be used as punishment.

3. Hard mechanical restraints shall not be used to restrain any prisoner in his cell.

4. A prisoner may be mechanically restrained by custody staff in a cell only under the following conditions.

   a. No prisoner may be mechanically restrained in any unit other than the Infirmary Restraint Unit.

   b. Only soft mechanical restraints may be used.

   c. No prisoner may be mechanically restrained except by prior personal approval of the highest custody officer on duty at the time of restraint, including the Superintendent or, in his absence, the acting Superintendent. If the highest custody officer approving the use of mechanical restraints is anyone other than the Superintendent or, in his absence, the acting Superintendent, the decision to restrain must be approved by the Superintendent or, in his absence, the acting Superintendent, within 15 minutes of the application of mechanical restraints. The

reasons for application of mechanical restraints shall be set out in writing and in detail.

d. Mechanical restraints may be applied to a prisoner, in the absence of a psychiatrist's order, for no greater period of time than two hours or a licensed psychiatrist arrives, whichever is shorter, and may be applied only in an emergency situation as the last alternative to prevent serious bodily harm to the prisoner.

e. A prisoner who is mechanically restrained without the order of a psychiatrist shall be kept under continuous observation by a trained medical staff employee, until released or a psychiatrist arrives.

f. Mechanical restraints shall be lessened and completely released at the earliest opportunity that the prisoner's behavior permits.

5. No prisoner may ever be mechanically restrained under standing orders or PRN orders of a medical doctor or psychiatrist.

6. No mechanical restraints may be applied to a prisoner in excess of the above conditions, except by order and under the direction of a psychiatrist having personal observation of the prisoner being restrained or to be restrained. No psychiatrist may order the application of mechanical restraints to a prisoner, except under the following conditions:

a. Only soft mechanical restraints may be used.

b. Mechanical restraints may not be used for a period of time longer than 24 hours, absent

immediate transfer of the prisoner to an appropriate, licensed medical/psychiatric facility.

c. No prisoner may be mechanically restrained in any unit other than the Infirmary Restraint Unit.

d. A prisoner who is mechanically restrained shall be personally observed by a qualified mental health professional, as defined below, at least every 15 minutes.

e. Mechanical restraints shall be lessened and completely released at the earliest opportunity that the prisoner's behavior permits.

f. A prisoner who is mechanically restrained shall be personally observed by a licensed psychiatrist at least every 12 hours, and the order to restrain be renewed, if at all, every 12 hours after personal observation by the psychiatrist.

7. A prisoner who is mechanically restrained shall be released from restraints to go to the bathroom as needed, but in no event less often than every four hours.

8. A prisoner who is mechanically restrained shall be released from restraints in order to eat at all regular mealtimes.

9. A qualified mental health professional shall mean:

(1) a psychiatrist with three years of residency training in psychiatry;

(2) a psychologist with a doctoral degree from an accredited program;

(3) a social worker with a master's degree from an accredited program and two years of clinical experience under the supervision of a Qualified Mental Health Professional;

(4) a registered nurse with a graduate degree in psychiatric nursing and two years of clinical experience under the supervision of a Qualified Mental Health Professional.

10. Mechanical restrains shall not be used as a method of punishment; around the head or neck of a prisoner; or in any way that causes undue physical discomfort, inflicts physical pain or restricts the blood circulation or breathing.

11. No prisoner shall be mechanically restrained without being properly clothed and being provided with proper bedding.

DATE: March 5, 1982

\s\ S. HUGH DILLIN
S. HUGH DILLIN
JUDGE, United States District Court

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 75-677-C

RICHARD A. FRENCH, ET AL., PLAINTIFFS

vs.

NORMAN G. OWENS, DEFENDANTS

UNITED STATES OF AMERICA, AMICUS CURIAE

ORDER

This case came before the Court on June 29, 1983 for a Compliance Conference with the Court. Attorneys for the parties advised the Court that they were needing to discuss compliance with the Order of this Court dated May 7, 1982. On August 13, 1982, after being ordered by the Court to meet and discuss implementation of the Order, the parties filed a Joint Report to the Court stating that:

> "The Counsel for the Plaintiffs and the Defendants have met with some of the Defendants and their counsel at two substantial, lengthy meetings to discuss compliance with the Order. Substantial progress has been made toward reaching agreement on several key items contained in the Order. The Defendants have made a good faith effort to move toward compliance with the Order as rapidly as current staff and resources permit. The parties plan to continue their discussion and are optimistic that some of the items in the Order can be resolved without further judicial proceedings. It is anticipated

> that some of the items in the Order will be, in the future, subject to judicial proceedings for a stay and for an appeal."

The Court finds, based on representations of counsel for both parties, that the progress made by the Defendants towards compliance with the Order has continued at a reasonable rate from August 13, 1982 until the present time. Specifically, based upon representation by counsel, the Court finds that the following progress has been made towards compliance with the Order:

1) Double celling has been dramatically reduced at the Indiana Reformatory to the point where approximately 40 cells are occupied by two inmates at the present time;

2) The kitchen and serving area at the Indiana Reformatory has been rehabilitated and is now in compliance with the Order of the Court;

3) The Maximum Restraint Unit has been rehabilitated and is now in compliance with the Order of the Court;

4) Substantial progress has been made toward construction of a new hospital or infirmary such that the defendants are now in compliance with or making substantial progress toward compliance with the Court's Order as it relates to medical facilities;

5) The professional medical care provider staff at the Indiana Reformatory has been significantly increased and is now in compliance with the Order of the Court.

6) The Defendants have significantly improved the access of self lock-up and protective custody inmates to programs, activities and counseling and the Defendants are currently in substantial compliance with the Order of the Court;

7) The procedures for delivery of medical care to the inmate population have been improved and the Defendants are currently in compliance with the Court's Order regarding medical procedures;

8) The Defendants have added 44 new positions for custody officers to the manning table of the Indiana Reformatory and have filled most of the those positions and the Defendants are currently in substantial compliance with the Court's Order to secure sufficient staff to safely and securely operate the Reformatory;

9) The Defendants have improved the availability of substance abuse programs and mental health services and counseling and are currently in substantial compliance with the Order of the Court as to those programs;

10) The Defendants have improved the availability of special medically prescribed diets, including the assignment of a licensed dietitian to the Indiana Reformatory and are in compliance with the Court's Order to provide special medically prescribed diets;

11) The Defendants have let bids which, when followed through to completion, will bring the living units at the Indiana Reformatory into compliance with the standards of the Indiana State Fire Marshall, and the Defendants have made satisfactory progress toward compliance with the Court's Order;

12) The Defendants have progressed towards bringing the work locations at the Indiana Reformatory into compliance with the Occupational Safety and Health Administration Regulations and are currently in substantial compliance with the Court's Order.

The Court having duly considered the Motion to Stay and the Motion to Amend filed by the Defendants, and the Court further having considered the responses thereto filed by the Plaintiffs, and the United States of America, Amicus Curiae and the Court being further advised by counsel at the conference with the Court on June 29, 1983,

NOW, THEREFORE IT IS ORDERED that the Order of this Court dated May 7, 1982, is amended as follows:

1) Paragraph 2 of the Order is amended to provide that effective October 1, 1983, and thereafter, the population of the Indiana Reformatory shall not exceed 1,750 persons;

2) Paragraph 3 of the Order is amended to provide that effective July 1, 1984, the population of the Indiana Reformatory, shall not exceed 1,375 persons, provided, however, that upon the completion of the 240 bed addition to the Indiana Reformatory which is now under construction, the population limit imposed by this paragraph shall be increased to 1,615 persons;

3) Paragraph 9 of the Court's Order is amended to provide as follows: "Each inmate at the reformatory who is in general population, protective custody or self-lock-up, shall have the opportunity to engage in recreation outside his living unit, for at least 90 minutes each day. Inmates confined to the Maximum Restraint

Unit or the Administrative Segregation Unit for Disciplinary Reasons shall have the opportunity to engage in recreation for a least 60 minutes each day. Weather permitting and except in cases of emergency, all inmate recreation at the Indiana Reformatory shall be out of doors. Inmates confined to Disciplnary Segregation shall be afforded a meaningful opportunity to recreate during the 60 minutes each day out of cell, which opportunity to recreate can be out of doors, on the range if adequate equipment is provided or at some other place, provided however that inmates who abuse the right to engage in recreation can be deprived of such opportunity for a period not to exceed 30 days."

4) Paragraph 11 of the Order is amended to provide that: "The right of an inmate to call a particular witness at a disciplinary hearing may be denied by the defendants only when the record reflects a justifiable reason for refusing to call the desired witness."

IT IS FURTHER ORDERED that the Defendants' Motion to Stay the Court's Order that all inmates be provided an educational, vocational or job assignment is hereby denied.

IT IS FURTHER ORDERED that the Defendants' Motion to Stay or Amend the Order entered by this Court limiting the use of mechanical restraints by the Defendants is hereby denied.

IT IS FURTHER ORDERED that counsel for both parties have represented to the Court that the foregoing Order disposes of all pending motions for stay and motions to amend the Order, but in the event any such motions have been inadvertently omitted from this Order, any and all other motions to amend or for stay

heretofore filed by the Defendants in this action are hereby denied.

DATED this 7th day of July, 1983.

\s\ S. HUGH DILLIN
S. HUGH DILLIN
UNITED STATES DISTRICT
JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP75-677-C

RICHARD A. FRENCH, ET AL., PLAINTIFFS

v.

NORMAN G. OWENS, ET AL., DEFENDANTS

MEMORANDUM ENTRY

This cause came on for hearing upon the defendants' Motion for Enlargement of Time Within Which to Comply With Paragraphs 3 and 5 of Order. Although defendants' motion is stated to be pursuant to Rule 6(b) of the Federal Rules of Civil Procedure, the Court construes it to be a motion for modification of a permanent injunction pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. See *U.S. v. City of Chicago*, 663 F.2d 1354, 1359, n.16 (7th Cir. 1981) (en banc).

Because this case is pending on appeal to the United States Court of Appeals for the Seventh Circuit, this Court is presently without jurisdiction to grant any modification of the permanent injunction. *Textile Banking Co., Inc. v. Rentschler*, 657 F.2d 844, 849 (7th Cir. 1981). However, having heard evidence on the defendants' motion, and in accordance with the procedures outlined in *Textile Banking*, the Court hereby declares that it is inclined to grant relief upon defendants' motion. 657 F.2d 844 at 849, n.2. Therefore, defendants are now free to rely upon this declaration in

seeking leave from the Court of Appeals to remand this case for consideration by this Court of a modification to paragraphs 3 and 5 of the permanent injunction.

Additionally, plaintiffs have orally moved in open court that this Court reconsider and modify those portions of the permanent injunction decided on pendent state law grounds. In view of the very recent decision of the United States Supreme Court in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984), it appears that some of the relief granted may be in violation of the Eleventh Amendment. The Court is advised that all parties have agreed in their briefs in the Court of Appeals that this case should be remanded to the district court for further consideration in light of *Pennhurst*. Thus, this Court hereby declares, pursuant to *Textile Banking*, that it is inclined to grant relief upon plaintiffs' motion. Plaintiffs, too, are free to rely upon this declaration in seeking leave from the Court of Appeals to remand this

case for further consideration in light of the decision in *Pennhurst*.

Entered this 30 day of August, 1984.

\s\ S. HUGH DILLIN
S. HUGH DILLIN
JUDGE, United States District Court

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 75-677-C

RICHARD A. FRENCH, MORRIS E. DOZIER, MARTIN W. BRADBERRY, HENRY C. JENNINGS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS

vs.

NORMAN OWENS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE INDIANA REFORMATORY; CLOID SCHULER, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE ADULT AUTHORITY, INDIANA DEPARTMENT OF CORRECTION; GORDON FAULKNER, IN HIS CAPACITY AS COMMISSIONER OF THE INDIANA DEPARTMENT OF CORRECTION,
DEFENDANTS

AMENDED ORDER

The Court having this day filed its amended memorandum of decision in the above entitled cause, as follows: (H. I.), now pursuant thereto

IT IS ORDERED ADJUDGED AND DECREED that the defendants, their agents, successors in office, and all persons acting in concert or participation with them, shall comply with the following requirements:

1. Paragraphs 3, 4, 5, 6, 8, 9, 10, 12, 13, 14, 15, 16, 17, 20 and 21 of this Court's order of May 7, 1982 are

hereby vacated. Consistent with the July 7, 1983 amendments made to the May 7, 1982 order, paragraph 11 of the order is amended to provide that: "The right of an inmate to call a particular witness at a disciplinary hearing may be denied by the defendants only when the record reflects a justifiable reason for refusing to call the desired witness."

2. Effective January 1, 1985, and thereafter the population at the Indiana Reformatory shall not at any time exceed 1,615 persons. This figure will be modified to take into consideration any additional newly constructed housing, if any.

3. Effective May 1, 1985, and thereafter, no more than one inmate shall be assigned to any cell.

4. Effective May 1, 1985, and thereafter, double bunk beds shall not be used in any dormitory.

5. At the earliest possible time and by no later than January 1, 1985, the medical staff at the Reformatory shall include at least two full-time medical doctors, five full-time physician's assistants, a full-time hospital administrator, a full-time pharmacist, a psychiatrist or psychiatrists for at least 40 hours per week, two Masters level psychiatric social workers, one Ph.D. clinical psychologist, two behavioral clinicians, nine medical technicians and two full-time clerk typists. All medical personnel shall be fully qualified, and all newly hired personnel must be able to converse fluently in the English language. If qualified personnel cannot be obtained at present salary levels, raise the levels.

6. Defendants shall provide medical care facilities and equipment sufficient to make available adequate

medical care to the inmate population. Within 30 days, defendants shall submit specific plans to comply with this paragraph by May 1, 1985. Said plans shall include development of alternative emergency care facilities, provisions for the prompt referral of inmate patients for diagnosis and treatment without nonmedical limitations on the number of daily referrals, obtaining adequate medical equipment, and either renovating the present facility or constructing a new medical facility at the Reformatory. Notwithstanding the earlier compliance date of January 1, 1985, renovation of the present medical facility shall be complete by January 1, 1986, or alternatively, construction of a new medical facility shall be complete by July 1, 1986.

7. Defendants shall establish adequate and proper procedures for the delivery of medical care to the inmate population. Within 30 days, defendants shall submit specific plans to comply with this paragraph by May 1, 1985. Said plans shall include procedures for sick call open to all inmates at least six days per week, delineation of responsibility and authority between the various medical personnel, provisions for close supervision of all nonphysician personnel, and provisions for daily sick call for all inmates confined to their cells.

8. Defendants shall provide substance abuse programs and mental health services and counseling for those who need and want such treatment. Within 30 days, the defendants will submit a plan for compliance with this paragraph, including crisis intervention, so that compliance will occur on or before May 1, 1985.

9. Defendants shall within 60 days submit to the Court a plan which will provide for preparation and

distribution of special medically prescribed diets under the supervision of qualified personnel.

10. The kitchen and dining room at the Indiana Reformatory shall be at all times maintained in such a condition as is necessary to provide the inmates with safe, sanitary and nutritionally adequate food.

11. Each inmate at the Indiana Reformatory who is in general population, protective custody, or otherwise segregated for nondisciplinary reasons, shall have the opportunity to engage in recreation outside his living unit for at least 90 minutes each day. Inmates confined to the Maximum Restraint Unit or the Administrative Segregation Unit for disciplinary reasons shall have the opportunity to engage in recreation outside the living unit for a least 60 minutes each day. The recreation shall be made available outdoors, unless inclement weather or security reasons necessitate otherwise, in which case the recreation opportunity may be indoors. Whether indoors or outdoors, the opportunity to recreate shall be in a facility where the inmates have an opportunity to engage in meaningful recreation. Inmates confined to Disciplinary Segregation shall be afforded a meaningful opportunity to recreate during the 60 minutes each day out of cell, which opportunity to recreate can be out of doors, on the range if adequate equipment is provided, or at some other place, provided, however, that inmates who abuse the right to engage in recreation may be deprived of such opportunity for a period not to exceed 30 days. Otherwise, permitting the inmates to have access to the range in front of the cells does not constitute compliance with this paragraph.

12. All inmates confined in the protective custody program and all other inmates segregated for nonpunitive reasons, shall be provided access to all programs, activities, recreation and counseling on a basis which is reasonably comparable with that afforded the general population. Within 60 days, the defendants shall submit specific plans to comply with this paragraph.

13. The defendants shall at all times employ an adequate number of correctional officers to secure within reason the personal safety of all inmates confined at the Indiana Reformatory. The correctional officers shall be adequately trained and shall be deployed in such a manner that the personal safety of the inmates is protected. Additional attention shall be given to dormitories and upper tiers of the cellblocks. The defendants shall submit a plan for complying with this paragraph within 60 days of this date.

14. All buildings at the Indiana Reformatory in which inmates live or work shall be reasonably secure from dangers of fire. In order to secure compliance with the personal safety requirements of the Eighth and Fourteenth Amendments, the defendants shall bring all buildings into compliance with the standards of the Indiana State Fire Marshal no later than May 1, 1985, and shall maintain the buildings in accordance with that standard at all times thereafter.

15. All operations in the various places of work and training at the Indiana Reformatory shall be operated in a safe manner as required by the Eighth and Fourteenth Amendments to the Constitution of the United States in accordance with the regulations of the Occupational Safety and Health Administration. The defen-

dants shall submit a plan for compliance with this paragraph within 60 days of this date.

All of which is considered and ordered this 14th day of December, 1984.

\s\ S. HUGH DILLIN
S. HUGH DILLIN
JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 75-677-C

RICHARD A. FRENCH, MORRIS E. DOZIER, MARTIN W. BRADBERRY, HENRY C. JENNINGS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS

vs.

NORMAN OWENS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE INDIANA REFORMATORY; CLOID SCHULER, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE ADULT AUTHORITY, INDIANA DEPARTMENT OF CORRECTION; GORDON FAULKNER, IN HIS CAPACITY AS COMMISSIONER OF THE INDIANA DEPARTMENT OF CORRECTION,
DEFENDANTS

MEMORANDUM

This case is before the Court on remand from the United States Court of Appeals for the Seventh Circuit, by agreement of the parties and pursuant to this Court's Memorandum Entry of August 30, 1984. This Court previously entered its Order and Memorandum of Decision awarding permanent injunctive relief in favor of the plaintiffs on May 7, 1982, finding that certain conditions of confinement at the Indiana Reformatory violated state and federal law. *French v. Owens*, 538 F.Supp. 910 (S.D. Ind. 1982). During the pendency of this case on appeal to the Seventh Circuit

Court of Appeals, the United States Supreme Court ruled in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L.Ed.2d 67 (1984), that under the Eleventh Amendment to the United States Constitution, federal courts lacked jurisdiction over claims for injunctive relief against state officials based upon state law.

Because the May 7, 1982 order was based, in part, upon findings of state law violations and compelled state officials to comply with state law, that order must be reconsidered in light of *Pennhurst, supra.*

The original decision in this case was rendered under the familiar principle of first considering pendent state law claims in order to avoid unnecessarily determining federal constitutional law questions. Numerous violations of state law were found and in areas where no specific state statute applied, certain violations of the Eighth and Fourteenth Amendments to the United States Constitution were found.

The Court specifically found that the deplorable housing and extensive overcrowding, including double-celling and double-bunking, constituted cruel and unusual punishment when considered in light of the other grievous conditions imposed upon the inmates. The Court also found that the totality of the conditions existing at the Reformatory violated the Eighth and Fourteenth Amendments. These holdings are not altered by this memorandum, *see Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983), *cert. denied*, 468, U.S. 1217, 104 S. Ct. 3587, 82 L.Ed.2d 885 (1984); *Palmigiano v. Garrahy*, 443 F.Supp. 956, 979 (D.R.I. 1977), nor are the previous findings with respect to prison discipline and access to courts altered herein.

The Court found that state statutes regulating prison conditions were violated at the Reformatory as follows: Ind. Code § 11-10-11-2 respecting exercise and recreation; Ind. Code §§ 11-10-3-2 and 11-10-4-2 respecting medical care for both physical and mental health problems; Ind. Code §§ 11-10-5-1, 11-10-6-2, and 11-10-6-3 respecting academic and vocational education and employment; and Ind. Code §§ 11-11-6-1 and 11-11-6-2 respecting a safe and healthful environment. Upon finding these state law violations, the Court did not determine whether the same conditions constituted violations of federal law. In light of *Pennhurst*, however, this Court lacked jurisdiction to consider the pendent state law claims. Therefore, the Court must now reconsider the findings in this case under federal law standards.

The Eighth Amendment to the United States Constitution proscribes the imposition of cruel and unusual punishment and is applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L.Ed.2d 758 (1962). The proscription against cruel and unusual punishment must be viewed under "evolving standards of decency that mark the progress of a maturing society." *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S. Ct. 2392, 69 L.Ed.2d 59, 68 (1981). Conditions of confinement will abridge the Eighth Amendment if they "involve the unnecessary and wanton infliction of pain . . . or are grossly disproportionate to the severity of the crime" (citations omitted). Id. Additionally, prison conditions resulting in serious deprivations of basic human needs have been found to constitute cruel and unusual punishment under the Eighth Amendment. *Hutto v. Finney*, 437 U.S. 678,

98 S. Ct. 2565, 57 L.Ed.2d 522 (1978); *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L.Ed.2d 251 (1976).

In considering challenged prison conditions under the Eighth Amendment, the Court must consider the "totality of the conditions of confinement" but nevertheless, must not make vague conclusions of unconstitutionality. *Smith v. Fairman*, 690 F.2d 122 (7th Cir. 1982). Conditions which independently are unquestionably constitutional do not become unconstitutional by their aggregation. *Wellman v. Faulkner*, 715 F.2d 269, 275 (7th Cir. 1983). Conditions may be restrictive and even harsh, but unless they constitute cruel and unusual punishment, "they are part of the penalty that criminal offenders pay for their offenses against society." On the other hand, conditions other than those in *Gamble* and *Hutto, alone or in combination* (our italics), may deprive inmates of the minimal civilized measure of life's necessities and be cruel and unusual. *Rhodes v. Chapman*, 452 U.S. 337, at 347.

1. Exercise and Recreation

The importance of regular exercise and recreation to the physical and psychological health of incarcerated individuals is well recognized. *Patterson v. Mintzes*, 717 F.2d 284 (6th Cir. 1983); *Ruiz v. Estelle*, 679 F.2d 1115, 1152, *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S. Ct. 1438, 75 L.Ed.2d 795 (1983). *See Preston v. Thompson*, 589 F.2d 300 (7th Cir. 1978); *Hendrix v. Faulkner*, 525 F. Supp. 435, 523 (N.D. Ind. 1981), *aff'd in part, rev'd in part sub nom, Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217, 104 S. Ct. 3587, 82 L.Ed.2d 885 (1984). A deprivation of exercise or recreation, impairing the physical or mental health of inmates,

violates the Eighth Amendment. *Ruiz v. Estelle*, 679 F.2d at 1152. Factors to consider in analyzing the adequacy of exercise and recreation for prisoners include the size of the cell, the amount of time the inmate spends locked in the cell each day, and the overall duration of confinement. *Id.* at 1151. The inmates at the Reformatory were found to be double-celled and double-bunked in less than half the space required under contemporary minimum standards.

The inmates are confined for up to 23 hours a day and frequently, when exercise and recreation are provided, the inmates are crowded in the tiny gymnasium where no meaningful exercise or recreation is possible for the vast majority of the inmates. Additionally, few inmates were found to have education assignments and only 64% had job assignments. The number of working inmates, nevertheless, exceeds the authorized number of positions available.

Lastly, the Indiana Reformatory is a maximum security institution in which most inmates are serving long, and frequently life, sentences. The conditions at the Reformatory have resulted in increased tension and violence and have caused a significant increase in the number of inmates seeking protective custody. Inmates in protective custody, as well as those in administrative segregation pending investigations of prison rules and pretrial detainees, are afforded significantly less exercise and recreation than inmates in the general population and are denied access to educational, vocational and work assignments. The increased severity of confinement for these inmates serves no penological purpose and is imposed upon them merely because the institution is overcrowded and lacks sufficient staff to

secure their safety. Therefore, considering the size of the cells and dormatories, the time spent confined in them, the duration of confinement at the Reformatory and other noted conditions, the deprivation of adequate exercise and recreation has a degenerative effect on the mental and physical health of the inmates and constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

2. Medical and Psychiatric Care

The defendants have an obligation to provide adequate medical care for individuals incarcerated at the Reformatory. Intentional denial of access to medical care or interference with prescribed treatment by prison officials violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L.Ed.2d 251 (1976). The Supreme Court has explained that "the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose." *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59, 69 (1981).

The obligation to provide medical care to incarcerated individuals extends to medical treatment for physical illness, to dental care, and to psychiatric and psychological care. *Ramos v. Lamm*, 639 F.2d 559, 574 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S. Ct. 1759, 68 L.Ed.2d 239 (1981). *See also Monmouth County Correctional Institution Inmates v. Lanzaro*, No. 82-1924 (D.N.J. Oct. 10, 1984); *Fields v. Gander*, 734 F.2d 1313 (8th Cir. 1984); *Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217, 104 S. Ct. 3587, 82 L.Ed.2d 885 (1984).

In considering whether the denial of medical care reaches constitutional significance, courts must determine whether the system of providing medical care evidences a deliberate indifference to the serious medical needs of the inmates. *Estelle v. Gamble, supra*; *Wellman v. Faulkner, supra.*

"Deliberate indifference" may be demonstrated by repeated examples of improper or inadequate medical treatment, interference with prescribed treatment, failure to treat legitimate medical complaints, or by systemic deficiencies in staff, facilities, equipment or procedures. *Wellman v. Faulkner, supra*; *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980).

The delivery of medical and psychiatric services, the physical facilities and the procedures for diagnosing and treating the serious health needs of the inmates at the Reformatory were previously found to be grossly substandard. The Court noted that serious staff deficiencies existed. The only staff physician also acts as medical director and has a private medical practice. Although he is "on call" 24 hours a day, the record shows examples of his unavailability and refusal to come to the Reformatory when called. Furthermore, he is a native Korean and is unable to communicate effectively in English. The remaining medical staff was found to be performing tasks for which they were not qualified and they were overworked and inadequately supervised. An additional physician position has been authorized for years but unfilled due to the unrealistic salary offered.

The procedures for the delivery of medical care to the inmates was found to be "so insufficient as to guarantee inadequate services." Memorandum of Decision of May

7, 1982 at 14. Medical technicians (a classification not recognized under Indiana law) see between 150 and 190 patients in a few hours, the physician assistants may see 20 to 30 patients in a two hour period, and the physician, out of the 190 patient requests per day, will see approximately 10 patients. Inmates on lockup are denied adequate medical services to an even greater degree. Instances of neglect of serious illnesses for unreasonable lengths of time, improper diagnosis and treatment by unqualified staff, failure to follow prescribed treatment, failure to provide special diets, and discontinuation of prescribed medication are documented in the record. The lack of effective procedures for the delivery of a minimum level of medical care is obvious and intolerable.

The physical facilities and equipment are inadequate, antiquated, obsolete and poorly staffed. The second floor infirmary, available for inmates with minor ailments requiring confinement to bed, has no mechanical ventilation and no medical personnel stationed on the ward. Inmates requiring any more acute care cannot be treated at or near the Reformatory but rather must be transported to Wishard Memorial Hospital in Indianapolis, 40 minutes from the Reformatory. Wishard Hospital provides both in-patient and out-patient services for inmates. Closer hospitalization facilities in Anderson, Indiana are almost never used.

As a result of the insufficient and unqualified medical staff, the inadequate procedures for the delivery of medical services to the inmates, and the inadequate physical facilities, instances of inadequate and improper medical care, interference with prescribed medication and treatment, and a denial of access to medical care for

legitimate medical complaints are commonplace. The record clearly shows that the extensive deficiencies in the medical care provided to the inmates constitute a deliberate indifference to the serious medical needs of the inmates, imposing upon them cruel and unusual punishment.

Similarly grievous deficiencies exist with respect to the availability of psychiatric care. The staff is grossly insufficient, especially in light of the high level of mental illness that occurs statistically in maximum security institutions such as the Reformatory. The mental health care staff contains only one psychiatrist available for diagnostic purposes for three hours per week. The other full-time and part-time staff members, including two psychologists and a behavioral clinician, are unable to prescribe medications and have an anti-drug bias. The intolerable barbaric practice of depriving psychotic inmates of needed medication to control their illnesses and, instead restraining them in beds, spread-eagle fashion, in the event of a seizure or episode of delusion has been prohibited by this court through the preliminary restraining order made permanent by the Order of May 7, 1984.

The insufficient staff coupled with grossly inadequate procedures for the delivery of psychiatric services result in improper or inadequate treatment or in a complete deprivation of treatment for the inmates' serious mental health problems. There is a long waiting list of inmates seeking psychiatric help, no method of rapidly transporting inmates to the only available acute psychiatric hospitalization facilities at the Westville Psychiatric Unit in Westville, Indiana, no follow-up care procedures upon return to the Reformatory, and

frequent discontinuation of prescribed medications. Additionally, 70% of the inmates at the Reformatory have histories of substance abuse, yet only five receive professional counseling and treatment. As in the case of medical care, an additional staff position has been authorized but unfilled due to an uncompetitive salary level.

The systemic deficiencies in the staffing and procedures for the delivery of psychiatric care to the inmate population demonstrate a deliberate indifference to the serious health needs of the inmates and result in cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

3. Safe and Healthful Environment

Inmates are subjected to double-celling and double-bunking with little if any area to sit erect or stand. The cells and dormitories have exceedingly poor lighting, inadequate ventilation, inadequate temperature control, are dirty and odorous and have virtually uncleanable toilets and lavatories. The inmates are denied adequate medical and psychiatric care and are unreasonably deprived of exercise, recreation, education or job opportunities. These aggravated, overcrowded housing conditions were found to violate the Eighth Amendment. Additional aggravating conditions, including hazardous work areas, inadequate precautions against fire, inadequate and unhealthy food services, other hazardous and unhealthy environmental conditions, and lack of protection of inmates, were found to violate state law. These latter conditions also violate federal law.

A. Work Areas

The work areas at the Reformatory were found to be in violation of minimum safety standards required under Occupational Safety and Health Administration (OSHA) regulations. The work areas particularly lacked adequate ventilation, respirators and gloves and the noise levels in some areas far exceeded the maximum allowable. Violations of these minimum standards unreasonably threaten the health and safety of the inmates and inflict upon them unnecessary and wanton pain.

B. Fire Protection

Most, if not all the buildings at the Reformatory pose an imminent threat to the safety of the inmates in case of fire. Improper storage of flammable substances, lack of exit signs, smoke detectors or alarm systems, lack of alternate methods of egress, and inadequate evacuation procedures are documented in the record. Failure to provide reasonable protection against the threat of fire constitutes cruel and unusual punishment. *See Santana v. Collazo*, 714 F.2d 1172 (1st cir. 1983), *cert. denied*, 466 U.S. 974, 104 S. Ct. 2352 (1984). The defendants have systematically failed to provide adequate fire protection, demonstrating a wanton indifference to the health and safety of the Reformatory inmates.

C. Food Services

The kitchen, commissary and food storage areas at the Reformatory are unsanitary and infested with mice and roaches. The kitchen floor was found to be uncleanable due to holes, cracks, crevices, missing tile and gross porosity. Pots and pans were in such poor

repair as to be uncleanable and the food warming tables in the dining area were inoperable. Procedures for providing special diets to inmates requiring such were lacking. The deplorable condition of the facilities and deficiencies in the delivery of food services pose an imminent threat to the health and safety of the inmates in violation of the Eighth and Fourteenth Amendments. *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

D. Environmental Health Problems

In addition to the infestation of the kitchen and food storage areas, the dormitories and one cellblock are infested with birds, flies, and other insects in warm months. Plumbing chases were found to be dirty and ideal for harboring insects and rodents. Lack of hot water in the cells, inadequate ventilation, and unsanitary toilets, showers, and lavatories encourage the spread of communicable diseases and pose additional serious public health threats. Inadequate lighting, especially on the administrative segregation unit, causes eyestrain, hinders sanitation efforts and smacks of unjustified punitive action. These conditions, exascerbated by overcrowding and inadequate opportunities for activity outside the cell or dormitory, fail to meet contemporary standards of decency and impose unnecessary and wanton pain upon the inmates.

E. Inmate Protection

The defendants have an obligation to protect inmates from unreasonable risks of violence or bodily harm from other inmates. *Walsh v. Brewer*, 733 F.2d 473, 476 (7th Cir. 1984). "'[D]eliberate indifference' to violent inmate attacks deprive inmates of their eighth amendment

rights." *Id.* at 476. At the Reformatory, severe forms of violence resulting in a number of fatalities, were noted to occur with distressing frequency.

The security staff at the Reformatory is inadequate to handle the number of confined inmates. The overcrowding and other grievous conditions result in increased tension to the "blowing level," increased incidences of violence, sexual assaults, and aggressive behavior. With an insufficient security staff and inadequate communication system among the prison guards, a lack of control over behavior among inmates is inevitable. The lack of security in the general population has required widespread use of protective custody, despite the additional restrictions and intolerable conditions imposed there. Still, violence persists.

The record clearly demonstrates that the inadequate personal security afforded the inmates constitutes cruel and unusual punishment.

4. Academic and Vocational Education

The inadequacy of academic and vocational education and work programs was previously found to violate state law. The deprivation of rehabilitative programs, however, generally does not constitute cruel and unusual punishment. *Bono v. Saxbe*, 620 F.2d 609 (7th Cir. 1980); *French v. Heyne*, 547 F.2d 974 (7th Cir. 1976). Nevertheless, providing access to rehabilitative programs to general population inmates while denying access to such programs to inmates segregated for nondisciplinary reasons may constitute a violation of the Equal Protection Clause of the Fourteenth Amendment. *Durso v. Rowe*, 579 F.2d 1365 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121, 99 S. Ct. 1033, 59

L.Ed.2d 82 (1979); *French v. Heyne, supra.* If the denial of access to rehabilitative programs for inmates in protective custody does not rationally further some legitimate state interest, the disparate treatment of those inmates may be proscribed. *Durso v. Rowe, supra; French v. Heyne, supra.*

Generally, a rational relationship exists between the legitimate state interest in maintaining prison security and providing protective custody to inmates with limitations on privileges. *Allgood v. Morris*, 724 F.2d 1098 (4th Cir. 1984); *Lovell v. Brennan*, 566 F.Supp. 672 (D.Me. 1983), *affirmed*, 728 F.2d 560 (1st Cir. 1984); *Durrough v. Hogan*, 563 F.2d 1259 (5th Cir. 1977). When the state creates the conditions necessitating the widespread use of protective custody, however, the denial of access to rehabilitative programs is not justified by the state's interest in prison security. *Palmigiano v. Garrahy*, 443 F.Supp. 956 (D.R.I. 1977). *See also Reddin v. Israel*, 455 F.Supp. 1215 (E.D.Wis. 1978). The security interest is not rationally furthered by overcrowding protective custody facilities while overcrowded, understaffed, and other deplorable conditions of confinement persist in the general population.

Such aggravating conditions exist at the Reformatory, resulting in the utter failure to control violence among the inmate population and necessitating extensive use of protective custody. Denying access to rehabilitative programs to the large number of inmates in protective custody is irrational and violates the inmates' rights under the Equal Protection Clause of the Fourteenth Amendment.

In summary, the conditions existing at the Reformatory at the time of and prior to the May 7, 1982 Order

and Memorandum in many respects imposed cruel and unusual punishment upon the inmates or denied certain inmates of their rights to equal protection. The Court recognizes that, since the 1982 order, substantial progress has been made toward correcting the unconstitutional conditions and that the improvements must be considered in fashioning an appropriate remedy. *Ramos v. Lamm*, 639 F.2d at 586. The improvements at the Reformatory noted in detail in the Court's memorandum Order of July 7, 1983, included new housing and health care facility construction, renovation of existing facilities, increased staffing and improved procedures for delivering necessary services and providing exercise, recreation, education and work. The Court, therefore, will modify the order of injunctive relief previously entered in this cause consistent with the constitutional violations found herein and in light of the progress made toward remedying the unconstitutional conditions of confinement.

Dated this 14th day of December, 1984.

\s\ S. HUGH DILLIN
S. HUGH DILLIN, JUDGE

Copies to:

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Edith S. Marshall, Department of Justice, HOLC Building, 320 First Street, N.W., Washington, D. C., 20530

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 75-677-C

RICHARD A. FRENCH, ET AL., PLAINTIFF

v.

EDWARD COHN, ET AL., DEFENDANTS

STIPULATION

Comes now the Plaintiff Class, by Counsel, and comes now the Defendants, in their official and individual capacities, by Counsel, and enter into the following Stipulations:

1. That by its Decision of November 26, 1985, the Seventh Circuit Court of Appeals remanded those portions of the above-referenced cause dealing with fire safety and OSHA standards to this Court, for further proceedings.

2. That, by agreement, counsel for the parties arranged inspections of the Indiana Reformatory by the Indiana State Fire Marshal's office and the Inspector of the Indiana Department of Labor, IOSHA.

3. That a majority of the deficiencies noted by the inspections have been corrected and that the remainder are in the process of correction.

4. That the Defendants will voluntarily commit to use their best efforts to remain in compliance with applicable Fire Safety and IOSHA regulations at the Indiana Reformatory. The term "best efforts" shall include periodic inspections, both by the Reformatory staff and appropriate outside agencies, and taking remedial action, including requesting of funds or obtaining appropriate variances, to remedy deficiencies noted during said inspections.

5. That the parties believe that the above commitment resolves the issues concerning fire safety and OSHA standards raised in the above-referenced cause.

WHEREFORE, the parties, by Counsel, jointly move this Court to approve the above Stipulation and for all other just relief in the premises.

Counsel for Plaintiff Class — Counsel for Defendants

/s/ DONALD R. LUNDBERG
DONALD R. LUNDBERG
William Marsh
Donald Lundberg

/s/ RONALD J. SEMLER
RONALD J. SEMLER
David A. Arthur
Ronald J. Semler
Deputy Attorney General's

Approved this 6th day of October, 1988.

S.HUGH DILLIN
Judge
United States District Court
Southern District of Indiana

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 75-677-C-D/F

RICHARD A. FRENCH, ETC., ET AL., PLAINTIFFS

v.

JACK DUCKWORTH, ETC., ET AL., DEFENDANTS

[Filed: June 5, 1997]

DEFENDANTS' MOTION TO TERMINATE DECREE

Defendants, by counsel, David A. Arthur, Deputy Attorney General, for their motion to terminate decree, state:

1. This Court has entered several orders and memoranda with regard to conditions of confinement at the Pendleton Correctional Facility (then named the Indiana Reformatory).

2. On April 26, 1996, the Prison Litigation Reform Act ("PLRA"), Title VIII of the Omnibus Appropriations Act, P.L. 104-134, was signed into law. The PLRA contains specific provisions for the modification and termination of judgments, including the addition of 18 U.S.C. § 3626(b)(2):

> **Immediate termination of prospective relief.**—In any civil action with respect to prison conditions, a defendant or intervenor shall be entitled to the

> immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means to correct the violation of the Federal right.

3. An examination of each order and amended order that has been entered in this case, and an examination of the Court's original memorandum entered May 7, 1982, and the memorandum concerning the amended order entered on December 14, 1984, demonstrates that Defendants are entitled to immediate termination of the consent judgment in this case because there was no finding in the record that the relief was narrowly drawn, extends no further than necessary to correct the violation of the Plaintiffs' Eighth and Fourteenth Amendment rights and is the least intrusive means to correct the constitutional violations.

4. The PLRA further provides at 18 U.S.C. § 3626(b)(1)(A) that:

> In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion by any party or intervenor—
>
> > (i) 2 years after the date the court granted or approved the prospective relief.

5. The last order entered in this case granting or approving prospective relief was on October 6, 1988, relating to fire and OSHA standards; therefore, more than two years has passed since the date of granting or approving all prospective injunctive relief in this case.

WHEREFORE, Defendants request that this Court terminate all prospective relief that has been granted or approved in this case and that the Court grant to them all other relief that is just and proper.

Respectfully submitted,

JEFFREY A. MODISETT
Attorney General of Indiana

By: /s/ DAVID A. ARTHUR
DAVID A. ARTHUR
Deputy Attorney General

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Motion has been duly served upon the counsel of record listed below, by United States mail, first-class postage prepaid on this 5th day of June, 1997:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 75-677-C

CLASS ACTION

RICHARD A. FRENCH, ET AL., PLAINTIFFS

v.

JACK DUCKWORTH, ET AL., DEFENDANTS

PLAINTIFFS' MOTION FOR A *TEMPORARY RESTRAINING ORDER* OR PRELIMINARY INJUNCTION TO STAY THE AUTOMATIC TERMINATION PROVISION OF THE PRISON LITIGATION REFORM ACT

Plaintiffs respectfully move the Court to issue a temporary restraining order or a preliminary injunction to stay the operation of the automatic termination provision of the Prison Litigation Reform Act (PLRA). In support of this motion, Plaintiffs state:

1. On June 5, 1997, Defendants filed their Motion To Terminate Decree under the Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(b)(2).

2. Pursuant to this statute, unless there is a ruling to the contrary, within thirty (30) days of filing the motion to terminate, all relief granted by prior judgments of this Court is terminated.

3. A restraining order or a preliminary injunction should issue to prevent the automatic termination provision of the Act from taking effect.

4. The standards for a preliminary injunction are met here:

(a) Plaintiffs will prevail on their claims that the PLRA's automatic termination provision is unconstitutional and unlawful and should not be applied in this instance.

(b) If the automatic termination takes effect, Plaintiffs will be caused irreparable harm for which there is no adequate remedy at law.

(c) The irreparable harm outweighs any harm that Defendants will suffer by the granting of the injunction.

(d) The granting of an injunction in this cause will not harm the public interest and will serve the public interest by enforcing the United States Constitution.

5. In support of this motion, Plaintiffs submit their Response to Defendants' Motion to Terminate Decree and Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order or Preliminary Injunction to Stay the Automatic Termination Provision of the Prison Litigation Reform Act which.

WHEREFORE, Plaintiffs request that a temporary restraining order or a preliminary injunction be issued to stay the automatic termination provision of the PLRA, and for all other proper relief.

Respectfully submitted,

June 30, 1997

/s/ HAMID R. KASHANI

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CERTIFICATE OF SERVICE

On the date shown below, I emailed and mailed, via First Class U.S. Mail, postage prepaid, a copy of this paper to Mr. David A. Arthur, Indiana Government Center South, Fifth Floor, 402 West Washington Street, Indianapolis, Indiana 46204-2770.

June 30, 1997 /s/ HAMID R. KASHANI
HAMID KASHANI

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Cause No. IP 75-677-C

RICHARD A. FRENCH, ET AL., PLAINTIFF

v.

JACK DUCKWORTH, ET AL., DEFENDANTS

10:30 A.M.
Indianapolis, Indiana
July 10, 1997

BEFORE THE HONORABLE S. HUGH DULLIN

Official Reporter's Transcript of
TEMPORARY RESTRAINING ORDER

APPEARANCES

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MACHINE SHORTHAND/COMPUTER TRANSCRIPT

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[3] CALL TO ORDER OF THE COURT

THE COURT: Well, let's see, we start out with a motion from the state to cancel the previous order of the Court. And we have a TRO. The question is should that be expanded to a preliminary injunction.

Who wants to go first?

MR. KASHANI: I think the TRO is our motion, so—

THE COURT: All right, go ahead.

MR. KASHANI: Section 3626(B)(2) of the—I thought it cannot be yours—says that "the plaintiffs in a prison reform case can move to terminate the Court judgment or the decree if at the time the judgment was entered there was no finding that the relief was narrowly drawn or that we have extended no further than necessary to address the violation," whether or right. That is the basis of the plaintiffs' motion.

Subsection (B)(3) allows the Court to continue with the relief granted previously if there is current or ongoing violation.

Those relate to the merits of the defendants' motion. We, of course, contend that Section (B)(2) is unconstitutional, but the Court has given us until July 31st to supplement our brief and submit a response to the defendants' motion on the merits.

What is at issue here is Section 3626(E)(2).

Section 3626(E)(2) says that 30 days after the defendants filed the motion the prospective relief should be terminated, no [4] further action required to part

four, on the part of anybody; just automatically terminated and done with, or at least the state.

All the district courts in Virginia—Judge Brottman in Virgin Islands to Judge Justice in Texas and the District Court in California—hold this provision unconstitutional regardless of however they have come out on the constitutionality of Section 3626(B)(2).

The reason for the unconstitutionality of 3626(E)(2), which provides for automatic termination is that it violates the separation of powers doctrine and it violates the due process rights of the prisoners.

It violates the separation of powers because it dictates the judgment. As the Supreme Court has noted, the separation of powers was incorporated into the Constitution to correct their rulings of a system of intermingled judical powers where in the old days when legislature is used to pass laws and change the outcome of cases. And that is why we have separation of powers, to stop that.

And as the judge—I believe it was Judge Enslen in Hadix—noted—that PLRA—in issuing a preliminary injunction, that is something which even a court cannot do without a finding of fact or holding some hearing.

The PLRA section says carry it in 30 days, and that is what we objected.

[5] There is also the due process concern. The due process concern is that even though the PLRA mandating a hearing to determine current or ongoing violations to keep the prospective relief, it only allows 30

days for the whole litigation to conclude for terminating the prospective relief.

In a case like this, we'd have to show current or on going violation that is probably going to take us a two or three month trial time, and with all the prehearing discovery requirements it probably is going to be a year of process.

And the courts have held that that provision of the PLRA which covers the judgment in 30 days is unconstitutional because of violation of due process for these reasons.

Of course, the PLRA itself is a product of intolerance and it is enacted in response to hostilities toward prisoners as a disfavored group. As Senator Abraham said in Congressional Record, criminals deserve to be punished, and Senator Reid the more difficult and more unpleasant the prison setting can be the better off we would be.

Well, there is no doubt our clients are criminals, but, you know, the hallmark of any society is how it treats the most unpopular people among any society. And it is unfortunate that they have taken these steps to go against the most unfavored group of people in the country, but at the same time our Constitution requires that even the rights of the least favored people to be respected and that is why we are here, because we [6] have the courts to provide the moment of reflection and decide the issue out of the passion of times.

That is my entire argument.

I am arguing only 3626(E)(2), not the rest of the motion.

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[20]

MR. KASHANI: Well, your Honor, if I may, I would like to reply to Mr. Arthur's argument, and also address that issue too.

THE COURT: Okay.

MR. KASHANI: Mr. Arthur's argument generally handles the whole thing altogether. And I want to make it clear that what we are here for is 3626(E)(2) which is automatic termination. Not the motion to terminate the decree. Because the relief granted was not narrowly drawn or to even extend more than was necessary to enforce a federal right. We are going to address that, but today the only issue is the automatic termination. And that is what we are contending is unconstitutional.

And the case cited by Mr. Arthur does not address that [21] issue.

The case of Jenson versus County of Lake does not address that issue.

The courts who have addressed the issue of automatic termination, no matter how eventually they have come out on the issue of whether they [are] upholding PLRA, or the PLRA self-constitutional or constitutional have held that automatic termination, that is, Congress saying that is contained and disposed of within 30 days is unconstitutional.

The case of James versus Lash that Mr. Arthur was referring to was the case decided by Judge Sharp, and in that case Judge Sharp at the end explicitly says that the courts are split on the constitutionality of the PLRA and nobody has presented that question here before me, so I am going to decide that issue.

So that case does not withstand for the fact that the PLRA can be held constitutional.

And they agree that there are courts who have held that PLRA is constitutional; there are courts which have held it unconstitutional. But all of them agree that automatic termination—that's the issue we are here for today—has been held unconstitutional by all courts which have addressed it.

As expected, irreparable harm—of course, the plaintiffs here have a judgment. That's their judgment. And when you take it away by an act of Congress it is terminated in 30 days, that is irreparable harm. When you take someone's property away from [22] them, that's harm.

And, further, there has been a decade of noncompliance before this Court. The records show that. And the defendants have never moved for termination under the Rufo. To show termination, to prove or seek termination under Rufo the defendants have to show substantial compliance. They have never done that.

And plaintiffs will be harmed if the protection of the judgment is taken away.

These defendants are not doing it out of the goodness of their heart. They are doing it at the reformatory because there is a judgment protecting the plaintiffs.

And also, the criteria for granting a preliminary injunction is not just irreparable harm. It also takes into account the possibility of success and a lot of other factors. But possibility of success in this case is very high, because Congress simply cannot say that 30 days after you, the defendant, file a motion in the case the judgment is vacated. Even under Rule 60(B) and—within 30 days that judgment is terminated anyway, no matter what the Court says, no matter what the plaintiffs do, it is just terminated and that is illegal.

The Justice Department originally filed a brief in the case of Plyver, said that Congress lacks the power to dictate absolutely that the judgment already rendered by the court be altered or suspended. Automatically stayed.

[23] The word jurisdiction does not appear in the PLRA, at least not in the section we are dealing with. And Congress cannot do, under the guise of jurisdiction, cannot do with the merits of the case, and the Supreme Court just recently decided the case under the Religious Freedom and Restoration Act, which I will give you a copy, your Honor, which essentially says Congress cannot prescribe the issue or dictate the criteria for deciding constitutional cases.

Of course, that is an issue which we will deal with when the main issue in the case, the defendants' motion, comes before the Court.

But the fact that the Court can alter a final judgment or—actually, I am reading from the Hadix case–the fact that the Court may alter a final judgment under Rufo does not affect the finality of the judgment, nor does it affect the ability of Congress to do so.

The Congress cannot come and dictate the result. And that is what the Section 3626(E)(2) does, disposing of the judgment. And that is what the issue is here. We are not attacking the whole PLRA today.

THE COURT: Okay, thank you.

MR. KASHANI: Did you have any question?

THE COURT: I don't think I did.

Okay, I will take this under advisement.

MR. KASHANI: Your Honor, may we have a copy of those [24] orders that the defendants presented here?

We also have a bunch of orders here.

MR. FAULK: Your Honor, if we might just take a moment to compare and make sure we both have a copy?

THE COURT: Well, you can compare them with Ms. McKnight's. And I am going to see how many I already have and try to get this back to you.

We just notified the government a couple days ago that the constitutionality was in question here. They haven't had a chance to enter an appearance or do anything. So meanwhile, you still have till the 31st to file a answer to the petition, as I understand it. Of

course, if the TRO is not extended as a preliminary injunction, they could argue that the Court's previous judgment has expired while we are waiting to brief the case; correct?

So I think for that reason and for the principal reason that the Court believes that Section 3626(B)(2) is clearly unconstitutional, as found by dozens of other courts. And, therefore, that the plaintiffs are likely to succeed on the merits and the defendants will not be harmed, the TRO is now converted into a preliminary injunction.

And you may tender me an order to that effect.

LAW CLERK POWLICK: Yes.

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